

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PAMELA JANE OWENS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

NO. C14-441-JLR-JPD

REPORT AND  
RECOMMENDATION

Plaintiff Pamela Jane Owens appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED.

I. FACTS AND PROCEDURAL HISTORY

At the time of the administrative hearing, plaintiff was a fifty-five year old woman with a high school education. Administrative Record (“AR”) at 37. Her past work experience includes employment as an administrative assistant, grocery checker, retail salesperson, customer service representative, mortgage clerk, and office manager. AR at 38, 50-51.

1 Plaintiff was last gainfully employed for six weeks as an administrative assistant at HydroFlow  
2 in 2012. AR at 38.

3 On April 22, 2011, she filed an application for DIB, alleging an onset date of  
4 September 25, 2010. AR at 18. Plaintiff asserts that she is disabled due to lower back pain,  
5 depression, migraine headaches, and anxiety. AR at 60, 76, 93.

6 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 93,  
7 98. Plaintiff requested a hearing, which took place on September 17, 2012. AR at 34-58. On  
8 October 18, 2012, the ALJ issued a decision finding plaintiff not disabled and denied benefits  
9 based on his finding that plaintiff could perform her past relevant work of data entry. AR at  
10 27. Plaintiff's request for review by the Appeals Council was denied, AR at 1-6, making the  
11 ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. §  
12 405(g). On March 26, 2014, plaintiff timely filed the present action challenging the  
13 Commissioner's decision. Dkt. 1.

## 14 II. JURISDICTION

15 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
16 405(g) and 1383(c)(3).

## 17 III. STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
19 social security benefits when the ALJ's findings are based on legal error or not supported by  
20 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
21 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
22 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
23 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
24 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
 2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
 3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
 4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
 5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
 6 must be upheld. *Id.*

7 The Court may direct an award of benefits where "the record has been fully developed  
 8 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
 9 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
 10 (9th Cir. 1996)). The Court may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
 12 claimant's evidence; (2) there are no outstanding issues that must be resolved  
 13 before a determination of disability can be made; and (3) it is clear from the  
 record that the ALJ would be required to find the claimant disabled if he  
 considered the claimant's evidence.

14 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
 15 erroneously rejected evidence may be credited when all three elements are met).

#### 16 IV. EVALUATING DISABILITY

17 As the claimant, Ms. Owens bears the burden of proving that she is disabled within the  
 18 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
 19 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
 20 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
 21 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
 22 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments  
 23 are of such severity that she is unable to do her previous work, and cannot, considering her age,  
 24 education, and work experience, engage in any other substantial gainful activity existing in the

1 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
2 99 (9th Cir. 1999).

3 The Commissioner has established a five step sequential evaluation process for  
4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
5 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
6 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
7 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
8 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
9 §§ 404.1520(b), 416.920(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the  
10 Commissioner proceeds to step two. At step two, the claimant must establish that she has one  
11 or more medically severe impairments, or combination of impairments, that limit her physical  
12 or mental ability to do basic work activities. If the claimant does not have such impairments,  
13 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
14 impairment, the Commissioner moves to step three to determine whether the impairment meets  
15 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
16 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
17 twelve-month duration requirement is disabled. *Id.*

18 When the claimant’s impairment neither meets nor equals one of the impairments listed  
19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
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23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
 2 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is  
 3 true, then the burden shifts to the Commissioner at step five to show that the claimant can  
 4 perform other work that exists in significant numbers in the national economy, taking into  
 5 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§  
 6 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the  
 7 claimant is unable to perform other work, then the claimant is found disabled and benefits may  
 8 be awarded.

#### 9 V. DECISION BELOW

10 On October 18, 2012, the ALJ issued a decision finding the following:

- 11 1. The claimant meets the insured status requirements of the Social  
 12 Security Act through December 31, 2015.
- 13 2. The claimant has not engaged in substantial gainful activity since  
 14 September 25, 2010, the alleged onset date.
- 15 3. The claimant has the following severe impairments: migraine  
 16 headaches, low back pain, attention deficit hyperactivity disorder,  
 17 depression and anxiety.
- 18 4. The claimant does not have an impairment or combination of  
 19 impairments that meets or medically equals the severity of one of the  
 20 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 21 5. After careful consideration of the entire record, the undersigned finds  
 22 that the claimant has the residual functional capacity to perform light  
 23 work as defined in 20 CFR 404.1567(b), meaning that she can lift 20  
 24 pounds occasionally and 10 pounds frequently, and that she can  
 stand/walk and sit for six hours in an eight-hour day. Additionally,  
 she can perform simple and some complex work (semi-skilled) that  
 does not involve more than occasional interaction with others.
6. The claimant is capable of performing past relevant work of data  
 entry. This work does not require the performance of work-related  
 activities precluded by the claimant's residual functional capacity.



1 merely state his/her conclusions. “He must set forth his own interpretations and explain why  
2 they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22  
3 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence.  
4 *Reddick*, 157 F.3d at 725.

5 The opinions of examining physicians are to be given more weight than non-examining  
6 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the  
7 uncontradicted opinions of examining physicians may not be rejected without clear and  
8 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
9 physician only by providing specific and legitimate reasons that are supported by the record.  
10 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

11 Opinions from non-examining medical sources are to be given less weight than treating  
12 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
13 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
14 evaluate the opinion of a non-examining source and explain the weight given to it. Social  
15 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at \*2. Although an ALJ generally gives  
16 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a  
17 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is  
18 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,  
19 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

20 2. *Dr. Jacobsen*

21 Dr. Jacobsen has been plaintiff’s treating physician since 1996. AR at 445. On  
22 February 23, 2012, he completed a check-box residual functional capacity questionnaire for  
23 plaintiff. AR at 445-49. He noted that plaintiff’s symptoms included lower back pain,  
24 shoulder pain, hip pain, and knee pain, and stated that her pain is “constantly” severe enough to

1 interfere with the attention and concentration required to perform simple work-related tasks.  
2 AR at 445. He stated that plaintiff needed to recline or lie down in excess of standard workday  
3 breaks during an eight-hour workday. AR at 445. He opined that plaintiff can walk “less than  
4 1” block without rest or significant pain, sit for 30 minutes at a time, and stand/walk for 5  
5 minutes at a time. AR at 445. In addition, he estimated that she can sit for a total of six hours  
6 in an eight-hour workday and stand/walk less than 1 hour in an eight-hour workday. AR at  
7 445. He opined that plaintiff needs to be able to shift positions at will, and will need to take a  
8 five minute break on an hourly basis. AR at 445.

9 With respect to her ability to lift and carry, he opined that plaintiff can only  
10 “occasionally” lift and carry ten pounds or less in a competitive work situation, where  
11 “occasionally” is defined as “less than 1/3 of the eight-hour workday.” AR at 446.<sup>2</sup> With  
12 respect to her ability to reach, handle, and finger objects, Dr. Jacobsen opined that plaintiff can  
13 only grasp, turn or twist objects 5% of an eight-hour workday, manipulate objects with her  
14 fingers 10% of an eight-hour workday, and reach 1% of an eight-hour workday. AR at 446.  
15 Finally, he opined that plaintiff is likely to be absent from work three to four times per month,  
16 and is not capable of full-time work. AR at 446.

17 Dr. Jacobsen also completed a mental capacity assessment on the same date. AR at  
18 447-49. He listed plaintiff’s diagnoses as chronic low back pain, shoulder instability, and  
19 major depression. AR at 447. With respect to plaintiff’s understanding, memory,  
20 concentration and persistence, Dr. Jacobsen opined that plaintiff was markedly limited in her  
21 ability to understand and remember detailed instructions, carry out detailed instructions,  
22 maintain attention and concentration for extended periods, sustain an ordinary routine without  
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24 <sup>2</sup> Dr. Jacobsen noted that plaintiff can “never” lift 20 pounds or 50 pounds in a competitive work situation. AR at 446.



1 special supervision, complete a normal workweek without interruptions from psychologically  
2 based symptoms, and perform at a consistent pace with a standard number and length of rest  
3 periods. AR at 447-48. In addition, he found her extremely limited in her ability to perform  
4 activities within a schedule, maintain regular attendance, and be punctual within customary  
5 tolerances. AR at 447. He did not assess any marked social limitations, but found plaintiff  
6 markedly limited in her ability to travel in unfamiliar places/use public transportation and set  
7 realistic goals or make plans independently of others. AR at 448-49. When asked to “describe  
8 the medical/clinical findings that support this assessment,” Dr. Jacobsen wrote, “major  
9 depression, chronic pain syndrome, migraines, chronic low back (sic).” AR at 449.

10 The ALJ afforded Dr. Jacobsen’s opinion “little weight because it is inconsistent with  
11 even the claimant’s own testimonial admission that she could lift 10 to 20 pounds. Dr.  
12 Jacobsen also completed a mental capacity questionnaire, indicating that the claimant had only  
13 slight limitations with the ability to get along with coworkers but that she had moderate to  
14 extreme limitations in concentration. This opinion is given little weight because it is not  
15 supported by the claimant’s ability to read for an hour at a time, her performance during her  
16 consultative examination, or by the other medical evidence of record.” AR at 27.

17 Plaintiff argues that the ALJ erred by rejecting Dr. Jacobsen’s opinion based upon  
18 plaintiff’s testimony that she can lift “ten to 20 pounds, 20 is pushing it.” Dkt. 13 at 15 (citing  
19 AR at 47). Plaintiff points out that this testimony was in response to a question about how  
20 much weight she could lift, and therefore her testimony that she can “perhaps lift a maximum  
21 of twenty pounds at one time does not contradict Dr. Jacobsen’s opinion that she could lift and  
22 carry 10 pounds for 1/3 of the workday or less.” Dkt. 13 at 15 (AR at 47, 446). Plaintiff  
23 argues that the ALJ “did not address the other significant limitations Dr. Jacobsen identified or  
24 provide any reason for why those limitations should not be adopted in the RFC.” *Id.* at 15-16.

1 With respect to Dr. Jacobsen's mental capacity questionnaire, plaintiff contends that "the ALJ  
2 failed to explain how the ability to read for an hour undermines Dr. Jacobsen's opinion, or  
3 identify how the consultative examination and 'other medical evidence' contradict Dr.  
4 Jacobsen's findings." *Id.* at 16. Plaintiff points out that Dr. Jacobsen was plaintiff's primary  
5 care physician at Everett Clinic, where plaintiff was treated more than 25 times between  
6 January 2010 and May 2012, and he performed physical examinations, prescribed medication  
7 for plaintiff's impairments, and referred her to specialists. *Id.* (citing AR at 252-361, 400-10,  
8 426-38, 450-84, 505-09). In light of his unique treating relationship, plaintiff asserts that "Dr.  
9 Jacobsen's opinion should be entitled to significantly more weight than the non-examining  
10 physicians who issued opinions, as he is in the best position to have obtained a longitudinal  
11 picture of Plaintiff's impairments, and his opinion is well supported by the medical evidence in  
12 the record." *Id.* at 16-17 (citing 20 C.F.R. § 404.1527(d)(2)(i), 416.927(d)(2)(i)).

13 The Commissioner responds that the ALJ could reasonably reject Dr. Jacobsen's  
14 opinion as inconsistent with plaintiff's testimony regarding her ability to lift, because plaintiff  
15 "testified that she could lift up to twenty pounds when she was asked how much she could lift  
16 without problems. This is plainly inconsistent with Dr. Jacobsen's opinion that she could  
17 never lift twenty pounds, even when Plaintiff's caveat that twenty was 'pushing it' is  
18 considered." Dkt. 14 at 4. The Commissioner also points that although the ALJ did not give  
19 reasons to specifically reject the other physical limitations Dr. Jacobsen included in the check-  
20 box form, "one contradiction is legally sufficient to support the ALJ's inference that Dr.  
21 Jacobsen's opinion is not a reliable assessment of Plaintiff's actual abilities and limitations."  
22 *Id.* at 4-5. With respect to Dr. Jacobsen's mental capacity questionnaire, the Commissioner  
23 argues that the ALJ reasonably rejected Dr. Jacobsen's opinions because of their inconsistency  
24 with plaintiff's admission that she reads for up to an hour at a time. *Id.* at 5 (citing AR at 27).

1 Dr. Jacobsen opined that plaintiff's symptoms were "constantly" severe enough "to interfere  
2 with the attention and concentration required to perform simple work-related tasks," AR at  
3 445, which the Commissioner argues is at odds with plaintiff's statement to a consultative  
4 examiner that she "enjoys reading and is able to sustain this activity for 1 hour at a time." *Id.*  
5 (citing AR at 22, 27, 414).<sup>3</sup> Thus, the Commissioner asserts "this was another valid reason for  
6 finding Dr. Jacobsen's opinion to be an unreliable assessment." *Id.*

7 Plaintiff replies that the Commissioner takes Dr. Jacobsen's statement about plaintiff's  
8 ability to lift, as well as plaintiff's testimony, out of context in order to present them as  
9 inconsistent. Dkt. 15 at 2. Specifically, "Dr. Jacobsen was asked whether Plaintiff can lift  
10 twenty pounds 'frequently,' 'occasionally,' or 'never,' in a competitive work situation." *Id.*  
11 (citing AR at 446). Given these choices, Dr. Jacobsen opined that plaintiff can "never" lift and  
12 carry twenty pounds in a competitive work situation. *Id.* Thus, plaintiff's testimony that she  
13 could lift twenty pounds at one time does not indicate that she could "occasionally" or  
14 "frequently" lift twenty pounds in a competitive work situation. *Id.* Plaintiff contends that the  
15 ALJ erroneously construes her statement that she could "push" herself to lift twenty pounds to  
16 mean that she can regularly lift twenty pounds in a competitive work situation. *Id.* at 3.

17 Similarly, with respect to plaintiff's statement that she can read for up to an hour at a  
18 time, plaintiff argues that the ALJ failed to explain how the ability to read for an hour is  
19 inconsistent with Dr. Jacobsen's opinion that her symptoms are "constantly" severe enough to  
20 interfere with the attention and concentration required to perform simple work-related tasks.

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<sup>3</sup> Plaintiff also argued the ALJ erred by failing to consider the factors for evaluating medical evidence outlined in 20 C.F.R. § 404.1527, 416.927. The Commissioner correctly points out that a regulatory requirement that an ALJ "consider" factors or issues does not necessarily create a duty to specifically discuss the factors in the decision if they are not dispositive.

1 Dkt. 15 at 3. Plaintiff points out that the Programs Operations Manual System (“POMS”) §  
2 25001.001.B.12 defines “constantly” as “the activity or condition occurs two-thirds or more of  
3 an eight hour day.” *Id.* Thus, “the fact that Plaintiff can read for an hour at a time does not  
4 contradict Dr. Jacobsen’s opinion that her pain is severe enough to interfere with her ability to  
5 concentrate for two-thirds or more of an eight-hour day.” *Id.*

6 Plaintiff is correct. As discussed above, the ALJ only offered one reason for rejecting  
7 Dr. Jacobsen’s physical residual capacity assessment. The ALJ considered Dr. Jacobsen’s  
8 opinion regarding plaintiff’s ability to lift to be more restrictive than plaintiff’s own testimony  
9 that she can lift “ten to 20 pounds, 20 is pushing it.” AR at 47. The Court agrees with plaintiff  
10 that Dr. Jacobsen’s opinion that plaintiff can only “occasionally” lift and carry ten pounds in a  
11 competitive work situation, where “occasionally” is defined as “less than 1/3 of the eight-hour  
12 workday,” and plaintiff can “never” lift 20 pounds in a competitive work situation, is not  
13 inconsistent with plaintiff’s testimony that she can lift ten to twenty pounds at maximum but  
14 lifting “20 [pounds] is pushing it.” AR at 47, 446. Both plaintiff’s testimony and Dr.  
15 Jacobsen’s opinion indicate that plaintiff cannot *regularly* lift and carry twenty pounds as part  
16 of her duties in a competitive work environment. Thus, there is no “inconsistency” between  
17 plaintiff’s testimony and Dr. Jacobsen’s opinion. This was not a specific and legitimate reason  
18 for the ALJ to reject Dr. Jacobsen’s physical residual functional capacity assessment.

19 In addition, Dr. Jacobsen’s RFC assessment included numerous other limitations that  
20 contradicted the ALJ’s RFC assessment in this case. For example, Dr. Jacobsen opined that  
21 plaintiff needs to recline or lie down during an eight-hour workday in excess of typical  
22 workday breaks, needs to be able to shift positions from standing, sitting, and walking at will,  
23 and will be absent from work three to four times per month. AR at 445-46. The ALJ did not  
24 provide any reasons for rejecting these aspects of Dr. Jacobsen’s opinion.

1 The Court is also not persuaded by the one reason given by the ALJ for rejecting Dr.  
2 Jacobsen's mental capacity assessment. AR at 447-49. Specifically, the ALJ considered Dr.  
3 Jacobsen's opinion that plaintiff "had moderate to extreme limitations in concentration" to be  
4 inconsistent with plaintiff's statement to the consultative examiner that she "enjoys reading and  
5 is able to sustain this activity for 1 hour at a time." AR at 22, 27, 414, 447. Although the ALJ  
6 does not identify exactly what functional limitation in the mental capacity assessment he is  
7 referring to, the most applicable one appears to be Dr. Jacobsen's finding that plaintiff's ability  
8 to "maintain attention and concentration for extended periods" was markedly limited. AR at  
9 447. Similarly, Dr. Jacobsen indicated on the RFC questionnaire that plaintiff's symptoms will  
10 "constantly" interfere with the attention and concentration required to perform simple work-  
11 related tasks." AR at 445.

12 The ALJ failed to explain how plaintiff's ability to read for an hour was inconsistent  
13 with Dr. Jacobsen's opinion about plaintiff's attention and concentration on either the mental  
14 capacity assessment or RFC questionnaire. With respect to Dr. Jacobsen's statement that  
15 plaintiff's symptoms are "constantly" severe enough to interfere with the attention and  
16 concentration required to perform simple work-related tasks, the word "constantly" does not  
17 mean 100 percent of the work day in the social security context. The Social Security  
18 Administration's *Programs Operations Manual System* ("POMS") § DI 25001.001.B.12  
19 defines "constantly," as it is used in an RFC, as meaning that "the activity or condition occurs  
20 two-thirds or more of an eight hour day."<sup>4</sup> Thus, the fact that plaintiff is able to concentrate for  
21 long enough to read for one hour at a time does not contradict Dr. Jacobsen's opinion that her  
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23 <sup>4</sup> By contrast, in the Social Security context, the term "frequent" describes how often a  
24 worker performs a certain task, and is defined as "from one-third to two-thirds of the time."  
SSR 83-10; see *Gallant v. Heckler*, 753 F.2d 1450 n.1 (9th Cir. 1984). See also POMS § DI  
25001.001.B.34.

1 pain is severe enough to interfere with her ability to concentrate for two-thirds or more of an  
2 eight-hour day. Similarly, the Court is not persuaded that reading for one hour undercuts Dr.  
3 Jacobsen's finding that plaintiff's ability to "maintain attention and concentration for extended  
4 periods" was markedly limited. AR at 447 (emphasis in original). This was not a specific and  
5 legitimate reason for the ALJ to reject Dr. Jacobsen's opinion.

6 Finally, the ALJ's only remaining reasons for rejecting Dr. Jacobsen's mental capacity  
7 assessment are plaintiff's "performance during her consultative examination" and "the other  
8 medical evidence of record." Apart from plaintiff's statement that she is able to read for one  
9 hour, however, the ALJ does not explain how plaintiff's performance during her consultative  
10 examination conflicts with Dr. Jacobsen's opinion. AR at 27. Similarly, the ALJ's reference  
11 to "other medical evidence of record" does not achieve the level of specificity that is required  
12 to reject a doctor's opinion. Notably, the Commissioner does not argue that these conclusory  
13 statements are sufficient bases for rejecting Dr. Jacobsen's opinion. *See* Dkt. 14 at 5. An ALJ  
14 must do more than offer his conclusions; he must also explain why his interpretation, rather  
15 than the treating doctor's interpretation, is correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir.  
16 2007) (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

17 Accordingly, the ALJ erred by rejecting Dr. Jacobsen's opinion without providing  
18 specific and legitimate reasons, supported by substantial evidence. *See Lester v. Chater*, 81  
19 F.3d 821, 830 (9th Cir. 1996). This case must therefore be reversed and remanded for further  
20 administrative proceedings. On remand, the ALJ shall re-evaluate the medical evidence,  
21 including Dr. Jacobsen's RFC assessment and mental capacity assessment. The ALJ shall also  
22 re-evaluate the opinions of Drs. Ekemo, Palermo, and Wolfe and Phan, being careful not to  
23 "cherry pick" the evidence by focusing only on parts of the opinions which are favorable to a  
24 finding of nondisability.

1           B.     The ALJ Shall Re-Evaluate Plaintiff's Credibility

2           Plaintiff argues that the ALJ improperly evaluated her testimony about her symptoms  
3 and limitations. Dkt. 13 at 21-22. For example, plaintiff argues that the ALJ failed to evaluate  
4 plaintiff's testimony regarding the dosage, effectiveness and side effects of plaintiff's  
5 medication, which can often cause fatigue. *Id.* at 21. Plaintiff points out that in Dr. Jacobsen's  
6 RFC questionnaire he indicated that she would experience drowsiness as a side effect of her  
7 medication, and that this would impact her capacity for work. Thus, if Dr. Jacobsen's opinion  
8 is credited, his opinion would support her allegations. *Id.* (citing AR at 445). *See also* AR at  
9 250 (Dr. Jacobsen's January 21, 2010 treatment note indicating that plaintiff asked to "cut  
10 down" her pain medications due to fatigue).<sup>5</sup>

11           The ALJ did not find that plaintiff was malingering and was thus required to provide  
12 "clear and convincing" reasons for rejecting her testimony. *Smolen v. Chater*, 80 F.3d 1273,  
13 1284 (1996). Because this case should be remanded for reconsideration of the medical  
14 evidence, and the ALJ's credibility determination was inextricably intertwined with the ALJ's  
15 assessment of the medical evidence (particularly Dr. Jacobsen's opinions), the ALJ's  
16 credibility finding should also be revisited on remand. After re-evaluating the medical  
17 evidence, including Dr. Jacobsen's RFC assessment and mental capacity assessment, the ALJ  
18 will be in a better position to assess plaintiff's credibility. Similarly, the ALJ shall revisit his  
19 RFC assessment and step four findings.

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24           <sup>5</sup> Plaintiff further argues that the ALJ erred by discounting her credibility based upon  
her receipt of unemployment benefits and her daily activities. Dkt. 13 at 21-22.

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings not inconsistent with the Court's instructions. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit by no later than **November 20, 2014**. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motion calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **November 21, 2014**.

This Report and Recommendation is not an appealable order. Thus, a notice of appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge acts on this Report and Recommendation.

DATED this 6th day of November, 2014.



JAMES P. DONOHUE  
United States Magistrate Judge